Supreme Court, U.S.
FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-60

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BLOSENSKI DISPOSAL SERVICE,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

BRIEF OF RESPONDENT COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

KENNETH A. GELBURD
Counsel of Record
Deputy Regional Chief
COMMONWEALTH OF PENNSYLVANIA
Department of Environmental
Resources - Office of Chief
Counsel - Eastern Region
1314 Chestnut Street
12th Floor
Philadelphia, PA 19107-4786

Telephone: (215) 560-4252

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Were the Courts of Pennsylvania correct in holding that the judicially created exclusionary rule should not be applied to the results of a 1981 inspection of a garbage hauler's non-permitted garbage transfer station by an agent enforcing, and reasonably relying upon the inspection provisions of, the Pennsylvania Solid Waste Management Act of 1980?

II. Were those Courts correct in finding that the crucial evidence was obtained by the inspector in "open fields" when using a common access road to the site and based on naked-eye observation of the building's interior?

III. Were those Courts correct in further finding that the proprietor of the garbage business and employees on the premises consented to the inspection?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT: THIS CASE PRESENTS NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING A WRIT OF CERTIORARI	8
A. The inspection was conducted in "open fields"	8
B. The inspector reasonably relied on a presumptively constitutional statute	11
C. Petitioner's employees and proprietor consented to the inspection	14
CONCLUSION	15

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION:

Amendment Four 7,8

CASES:

Commonwealth v. Lutz,
512 Pa. 192, 516 A.2d 339
(1986), vacated and remanded,
480 U.S. 927 (1987),
vacated and remanded
517 Pa. 481, 538 A.2d 872
(1988) 12

Illinois v. Krull,
480 U.S. 340 (1987) 11,12

Oliver v. United States,
466 U.S. 170 (1984) 10

Schneckloth v. Bustamonte,
412 U.S. 218 14

United States v. Dunn,
480 U.S. 294 (1987) 10,12

United States v. Mendenhall,
446 U.S. 544 (1980) 14

TABLE OF AUTHORITIES (Continued)

Page

PENNSYLVANIA STATUTES:

Solid Waste Management Act,
35 P. S. §§ 6018.101 et.seq. i,1,5, 11,12

PENNSYLVANIA REGULATIONS:

Title 25, Pa. Code
Chapter 75 2,5

Title 25, Pa. Code
Chapter 271 2

NO. 89-60

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BLOSENSKI DISPOSAL SERVICE,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

BRIEF OF RESPONDENT COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

STATEMENT OF THE CASE

In July of 1981, less than a year after the Pennsylvania Solid Waste Management Act of 1980, the Act of July 7, 1980, P.L. 380, as amended, Title 35 P.S. §§ 6018.101 et seq. (Solid Waste Act) became effective, an inspector of the Bureau of Waste Management of the Pennsylvania Department of Environmental

Pennsylvania Department of Environmental Resources (Department) headed out from his office in a Department-owned car [P.I 16a-17a].[1] Travelling in the course of his duty to enforce the Solid Waste Act, the inspector, Mr. Holmes, knew that at his destination in West Nantmeal Township, Chester County he would find a "transfer station" belonging to respondent Blosenski Disposal Service (BDS).[2]

[1] Petition, Appendix I, pp. 16a- 17a. In this Brief, references to Appendices to the petition for Writ of Certiorari will be abbreviated by the letter "P", followed by the letter labelling the appendix, followed by the page number petitioner used within the appendix.

[2] A transfer station, as defined in the then effective Department solid waste management regulations at Title 25 Pa. Code, Section 75.1, was a facility used by garbage haulers to compact solid waste as brought in by collection trucks and to cram the compacted waste into trucks for hauling to disposal sites. See also Title 25 Pa. Code, Section 271.1 (definition of "transfer facility").

From personal knowledge acquired in the course of his duties, Mr. Holmes was aware that the BDS transfer station was a large concrete building having a doorway which was large enough to admit a trash truck, but no door [Petition, pp. 22-23]. He knew that the building had a trash compactor unit in the bottom, and how far a trash truck would back into the building to dump its load into the compactor unit and also how a truck in that position looked from outside the building. He further was aware that BDS did not have the Department permit required for operation of the building as a transfer station [P. I 16a-18a, 48a].

Just after 1:00 p.m., Mr. Holmes turned off the public highway onto the access road which served, in common with the BDS transfer building, a number of other commercial buildings on the same piece of property [P. I 16a, 46a]. From that common access road, just past the point at which it intersected the public highway, anyone could see the compactor building and whether there was a trash truck inside it [P. I 46a].

Seeing there was such a truck in the building, Mr. Holmes drove up to the building's access ramp. Mr. Holmes was not wearing any item, nor was his state car marked in a manner, that identified a connection with the Department, but as he approached the building and the truck, two men working on the truck, whom he had never seen before, stopped what they were doing [P. I 37a-38a]. One of them made

a telephone call, and some moments later Joseph Blosenski, Jr., admitted proprietor of petitioner BDS, arrived in a truck. Blosenski asked Mr. Holmes why he was there. Mr. Holmes answered that he was there to make sure the transfer station was not in operation. Blosenski asked, "Is that all?" and left [P. E 1, G 2-3].

Mr. Holmes subsequently issued to BDS a summary citation charging unlawful conduct in BDS' operation of the transfer station, and in BDS' permitting its property to be used for the facility contrary to Title 25 Pa. Code § 75.21(a), without a Department permit, under Section 606(a) of the Solid Waste Act, 35 P.S. § 6018.606(a). Convicted on both counts by a district justice, BDS was sentenced to pay costs, plus the minimum statutory fine of one hundred dollars,

on each count in October 1981. BDS exercised its right to a de novo trial in the Chester County Court of Common Pleas, and was again convicted on both counts in October 1983. That Court sitting en banc denied BDS' posttrial motions in March 1987, and imposed a stipulated sentence of five hundred dollars plus costs on each of the two counts. Between that time and the date of filing the instant petition, BDS lost its appeal and application for reargument to the Commonwealth Court of Pennsylvania, as well as its petitions to the Supreme Court of Pennsylvania for allowance of appeal and for reconsideration of denial of allowance of appeal [P. G, F, H, E, C, B, A].

SUMMARY OF ARGUMENT

No new fact situation or application of this Court's doctrines is presented in this matter. Three valid, independent applications of Fourth Amendment case law justify that the evidence was properly admitted.

ARGUMENT: THIS CASE PRESENTS NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING A WRIT OF CERTIORARI

A. The inspection was conducted in "open fields"

Pennsylvania's Courts scrupulously followed this Court's more recent interpretations of the requirements of the Fourth Amendment concerning police-power inspections of business property, and in this case have upheld the trial Court's admission of the results of inspection on several different grounds, any one of which is sufficient to sustain the judgment below.

Petitioner BDS had no reasonable expectation of privacy given the layout, established in the Court of Common Pleas, of the property on which its concrete transfer station sat. Department inspector Holmes was aware that BDS held no permit for processing garbage brought in from outside the building; he also knew the way a trash truck looked when pulled into the building in the position necessary to deposit garbage into BDS' compactor unit. From an access road to the building common with other commercial buildings, from a fairly distant point at which BDS had no claim to exclude visitors, Mr. Holmes was able to see whether a BDS truck was situated at such an angle. On the date in question that is precisely what he did see. His naked-eye observation occurred in open fields, including a view of the inside of the station and the cessation of activity

on the trash truck. Based on this Court's recent reaffirmation of the "open fields" doctrine in Oliver v. United States, 466 U.S. 170 (1984) and United States v. Dunn, 480 U.S. 294 (1987), the Pennsylvania decision in this matter was entirely justified. By the time the inspector reached the doorless transfer station, he had already observed the suspiciously angled truck from the common access road. At the entrance to the station, the inspector obtained enough evidence to support conviction. Pennsylvania's Commonwealth Court expressly so held as a matter of fact [P. E, 5] and explicitly upheld the refusal to exclude the results of the search, basing its analysis on Dunn, supra. Based on the facts as found below and the Pennsylvania Courts' adherence to the

above enunciated legal principles, the petition sets forth no new facts or theories meriting this Court's attention.

B. The inspector reasonably relied on a presumptively constitutional statute

The facts of this matter are, as the Pennsylvania Court found, essentially identical with those in Illinois v. Krull, 480 U.S. 340 (1987), except, of course, that the Commonwealth of Pennsylvania does not for one moment agree that any portion of its Solid Waste Act violates or ever violated the United States Constitution in any respect. Although five years after the Department's inspection at BDS a sharply divided Pennsylvania Supreme Court made such a finding respecting the entry and inspection provisions of that Act,

35 P.S. § 6018.608(3), that plurality opinion was vacated by this Court and the matter remanded to the Pennsylvania Supreme Court in light of Dunn, supra. Commonwealth v. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), vacated and remanded, 480 U.S. 927 (1987), vacated and remanded, 517 Pa. 481, 538 A.2d 872 (1988). Assuming arguendo that petitioner BDS were correct in Constitutionally challenging that provision of the statute, this matter is Krull in every material aspect. As with the officer in Krull, the Department inspector entered the BDS access road in reliance, found objectively reasonable by the Court below, on the inspection provision of an administrative statute in what was (as a matter of law) a pervasively regulated industry. Here, as in Krull, the application of the exclusionary rule

(which is not intended to reward lawbreakers if alleged state misconduct uncovers their violations) to the evidence obtained by the Department inspector in objectively reasonable reliance on a statute would have no deterrent effect. Unless a statute is clearly unconstitutional, an enforcement officer cannot be expected to question the judgment of the legislature that passed the statute. No new fact or legal theory respecting the "objectively reasonable reliance" exception to the exclusionary rule is presented in BDS' petition for this Court to consider.

C. Petitioner's employees and proprietor consented to the inspection

A third independent ground exists for the Pennsylvania Courts' admission of the Department's inspection results. BDS' employees, followed by the head of the business, consented to the search. As BDS concedes [Petition, p. 21], the consensual nature of a search is very fact sensitive; each case depends on the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218. In this case the trial court found expressly that consent was given; United States v. Mendenhall, 446 U.S. 544 (1980). Nothing remains for this Court to explore respecting the time-honored doctrine.

CONCLUSION

Three independent grounds, found by Pennsylvania Courts in reliance upon this Court's recent pronouncements, support the Pennsylvania Courts' admission of the results of the Department inspection of July 1981. This Court should deny the petition for certiorari.

Respectfully submitted,

KENNETH A. GELBURD
Assistant Counsel
COMMONWEALTH OF PENNSYLVANIA
Department of Environmental Resources - Office of Chief Counsel - Eastern Region
1314 Chestnut Street
12th Floor
Philadelphia, PA 19107-4786

Telephone: (215) 560-4252

DATE: August 16, 1989

kagx/ken.sup